No. 49540-6-II

WASHINGTON STATE COURT OF APPEALS
DIVISION II

MARK HAUBRICH

Appellant,

v.

THE PIZZA SPECIALISTS, INC.

Respondent.

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authority

I. INTRODUCTION

This appeal challenges the trial court's misapplication of Washington law on summary judgment and premises liability in its order dismissing Appellant Mark Haubrich's ("Appellant" or "Mr. Haubrich") claim for negligence against Respondent The Pizza Specialists Inc., dba Brewery City Pizza Company #3, ("Respondent" or "BCP"). On August 9, 2012, Mr. Haubrich was seriously injured when the chair he was sitting in broke from underneath him while eating at the Respondent's restaurant.

Under Washington law, a business owner is liable to an invitee for an unsafe condition on the premises if the condition was caused by the proprietor or his employees, or the proprietor had actual or constructive notice of the unsafe conditions. *Fredrickson v. Bertolino's Tacoma, Inc.*, 131 Wn. App. 183, 189, 127 P.3d 5 (2006). Reasonable care requires a landowner to inspect for dangerous conditions. Id., citing *Tincani*, 124 Wn.2d at 139, 875 P.2d 621.

Appellant's expert, Tom Baird provided opinions the chair which broke was "unreasonably hazardous and dangerous" at the time because it "had exceeded its useful life." CP 39. In addition, Mr. Baird opined, "the restaurant did not have an effective chair inspection program in place." CP 39. These opinions created a genuine issue of material fact precluding summary judgment. The trial court erred in granting summary judgment for

BCP under the facts of this case.

For all the reasons discussed herein, this Court should reverse the Order Granting Summary Judgment and remand the case for further proceedings in the trial court.

II. ASSIGNMENTS OF ERROR

Appellant assigns the following errors:

1. The trial court erred in granting Respondent Brewery City Pizza's Motion for Order Granting Summary Judgment.

2. The trial court erred in finding no genuine issue of material facts existed regarding Respondent's negligence.

3. The trial court erred in finding no genuine issue of material fact established the Respondent owed a duty to Appellant.

4. The trial court erred in finding the Respondent exercised reasonable care regarding the inspection of the premises and chairs.

5. The trial court erred in finding the Baird Report and Declaration did not provide a foundation for his opinions regarding how or why the chair broke or concerning the chair inspections.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Respondent had actual or constructive notice of the dangerous condition when the useful life of the chairs had been exceeded is a genuine issue of material fact precluding summary judgment.

2. Whether the Respondent had an effective chair inspection program in place is a genuine issue of material fact precluding summary judgment.

3. Whether the trial court abused its discretion in determining the expert report and Declaration of Tom Baird did not

provide the necessary foundation regarding how or why the chair broke or concerning the chair inspections.

IV. STATEMENT OF THE CASE

A. Facts:

Plaintiff Mark Haubrich and friend, Deena, went to Brewery City Pizza on Martin Way in Olympia, WA for a meal on August 9, 2012. *See,* CP89. They were seated on the outside deck by the hostess. CP90. They ordered meals and sat outside, on plastic chairs provided by the Defendant, The Pizza Specialists, dba, Brewery City Pizza. After about forty-five minutes, just before they were preparing to leave, the plastic chair Mr. Haubrich was sitting in "exploded" from underneath him. CP90. He fell straight down, landing hard on his "gluteus maximus."CP94. Mr. Haubrich was severally injured as a result of falling from the broken chair. CP91-93. There is no dispute the chair broke and Mr. Haubrich was injured. *See*, CP35-48.

B. Procedural History.

The trial court improperly applied Washington law on premises liability despite the existence of genuine issues of material fact precluding summary judgment of Mr. Haubrich's claim. This court should correct the trial court's error and reverse the October 7, 2016 order granting Summary Judgment.

C. Standard of Review.

This Court reviews a summary judgment order de novo and engages in the same inquiry as the trial court. *Millson v. City of Lynden*, 298 P.3d 141, 144 (2013). Accordingly, this Court reviews the facts and all reasonable inferences from the evidence in the light most favorable to Mr. Haubrich as the non-moving party. *Caldwell v. Yellow Cab Service, Inc.*, 2 Wn. App. 588, 592, 469 P.2d 218 (1970). Summary judgment is appropriate only if the moving party has shown that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Id. It should be granted only if "reasonable persons could reach but one conclusion." *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn. 2d 59, 70, 170 P.3d 10 (2007). "[T]o successfully move for summary judgment, a party must demonstrate a lack of evidence or a material fact which cannot be rebutted." *Weatherbee v. Gustafson*, 64 Wn. App 128, 132, 822 P.2d 1257 (1992). Application of the above standards to this case overwhelmingly demonstrate that the trial court should not have granted summary judgment based upon numerous genuine issues of material fact.

V. ARGUMENT

A. Elements of Premises Liability.

To establish the elements of an action for negligence, the plaintiff must show, "(1) the existence of a duty owed, (2) breach of that duty, (3) a

resulting injury, and (4) a proximate cause between the breach and the injury." *Iwai v. State*, 129 Wn.2d 84, 96, 915 P.2d 1089 (1996). There is no dispute Mr. Haubrich was a business invitee of the Respondent on August 9, 2012, when the chair he was sitting in broke from underneath him. There is no dispute Mr. Haubrich was injured as a result of the incident. The only issue is whether Respondent breached a duty of care. "Generally, a business owner is liable to an invitee for an unsafe condition on the premises if the condition was 'caused by the proprietor or his employees, or the proprietor [had] actual or constructive notice of the unsafe conditions.'" *Fredrickson v. Bertolino's Tacoma, Inc.,* 131 Wn.App 183, 189, 127 P.3d 5 (2006), quoting *Wiltse v. Albertson's Inc.,* 116 Wn.2d 452, 460, 805 P.2d 793 (2001).

The Court in *Fredrickson,* in a case specifically involving injury caused by a broken chair at a coffee shop, outlined reasonable care and constructive notice as follows:

> Reasonable care requires a landowner to inspect for dangerous conditions, "'followed by such repair, safeguards, or warnings as may be reasonably necessary for [the invitee's] protection under the circumstances.'" *Tincani*, 124 Wash.2d at 139, 875 P.2d 621 (quoting RESTATEMENT (SECOND) OF TORTS § 343, cmt. b). Constructive notice arises where the condition "'has existed for such time as would have afforded [the proprietor] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger.'" *Ingersoll*, 123 Wash.2d at 652, 869 P.2d 1014 (quoting *Smith*, 13 Wash.2d at 580, 126 P.2d 44). Ordinarily, it is a question of fact for the jury whether, under all of the circumstances, a defective

> condition existed long enough so that it would have been discovered by an owner exercising reasonable care. *Coleman v. Ernst Home Ctr., Inc.*, 70 Wash.App. 213, 220, 853, P.2d 473 (1993) (citing *Morton v. Lee*, 75 Wash.2d 393, 450 P.2d 957 (1969).

The question in the present case is, did the appellant create a genuine issue of material fact, under all the circumstances, to establish a defective condition existed long enough so that it should have been discovered by Brewery City Pizza?

B. Expert Tom Baird is qualified to opine on these issues.

The expert opinion of Tom Baird, offered by Appellant, creates genuine issues of material fact. Mr. Baird is well qualified to offer opinions regarding the breach of the duty of care in this matter. His Declaration, Report and Curriculum Vitae outline his extensive experience in this area. CP, 34-86.

He has owned and operated two different restaurants. He has investigated and consulted on nearly 1300 injury cases since 1994. He is a Certified Safety Manager and a Certified Forensic Consultant. Respondent offered no expert testimony on either a proper inspection procedure for the chairs or the useful life of the chairs.

C. There is a Genuine Issue of Material Fact Whether Respondent had Notice of a Dangerous Condition

The owner of Brewery City Pizza, Dennis Gard testified regarding the

chairs, "As I recall, there were some cracks and fissures reported to me." CP **(Gard Dep at p. 32, Johnson Dec)**. He also testified, "to be honest, I am not certain they've broken in this manner. We have had chairs break. I'm – I Would be hesitant to say in like manner, but it's possible." *Id.* The Respondent had actual notice of issues with the chairs. Washington case law makes clear the Respondent can't simply ignore these prior problems. "Rather, the question is whether 'the nature of the proprietor's business and his methods of operation are such that the existence of unsafe conditions on the premises is *reasonably foreseeable.*'" *Iwai v. State*, 129 Wn. 2d 84, 100, 915 P.2d 1089 (1996) (quoting *Ingersoll v. DeBartolo Inc.*, 123 Wn. 2d 649, 654, 869 P.2d 1014 (1994) (emphasis supplied). In Iwai, the plaintiff fell and was injured on snow and ice in a parking lot owned by the defendant. The court found that the plaintiff's failure to establish actual or constructive notice of the specific dangerous condition should not prevent the court form hearing the case, and that a strict application of the notice requirement would unfairly allow the defendant to plead ignorance about each patch of ice causing an injury, despite its general knowledge of the situation.

Mr. Baird opined, "The chair that collapsed was in an unreasonably hazardous and dangerous condition at the time of the incident and had exceeded its useful life." CP 37. The chair had only a three year warranty and

had been in use for at least seven to eight years at the time it broke, injuring Mr. Haubrich. Mr. Gard admitted, the chairs, "could have been" purchased further back than 2004-2005 because they no longer had the purchase records. CP (Gard dep at p. 16).

Mr. Haubrich created a genuine issue of material fact concerning the foreseeability of the dangerous condition of the chair. These issues all relate to notice and all reasonable inferences from the evidence must be drawn in Mr. Haubrich's favor as the non-moving party on summary judgment.

D. Respondent Did Not Exercise Reasonable Care in Inspecting The Chairs.

Mr. Baird opines, "the restaurant did not have an effective chair inspection program in place to assure that the chairs were safe for customers." CP 37. Mr. Baird extensively explains the reasons for this opinion in his report including, exposure to ultraviolet light, extreme cold temperatures, frequency and manner of use, and likelihood of misuse or abuse. CP 37-39. The chair inspection program of Respondent was poorly designed and poorly implemented, particularly given the actual notice of prior issues with these specific chairs. The Court's decision in *Fredrickson* is instructive. The Court upheld the summary judgment dismissal because the plaintiff failed to present any expert testimony that either the inspection procedures were inadequate or that the chairs in use posed an unreasonable

risk or harm to the customers. The Appellant here has offered unchallenged expert opinion that the inspection procedure was not adequate and the chairs had exceeded their useful life and were thus an unreasonable hazard. The Appellant, through the opinions of expert Tom Baird, has created a genuine issue of material fact which should be determined by a jury.

VI. RAP 18.1

Appellant respectfully requests any and all statutory costs and fees he may be entitled to if determined to be the prevailing party.

VII. CONCLUSION

For all of the foregoing reasons, Appellant respectfully requests this Court reverse the order granting summary judgment for Respondent and remand the case for further proceedings in the trial court.

DATED: February 10th, 2017.

RON MEYERS & ASSOCIATES PLLC

By: _____

Ron Meyers, WSBA No. 13169
Matthew G. Johnson, WSBA No. 27976
Tim Friedman, WSBA No. 37983
Attorneys for Appellant

No. 49540-6-II

WASHINGTON STATE COURT OF APPEALS

DIVISION II

MARK HAUBRICH, Appellant, v. THE PIZZA SPECIALISTS, INC., Respondent.	**DECLARATION OF SERVICE**

I declare under penalty of perjury under the laws of the State of Washington that on the date stated below I caused the documents referenced below to be served in the manners indicated below on the following:

DOCUMENTS:
1. Declaration of Matthew G. Johnson; and
2. This Declaration of Service.

ORIGINALS TO:
David C. Ponzoha, Court Clerk
Washington State Court of Appeals Division II
[✓] Via ABC Legal Messenger

COPIES TO:
Attorney for Defendant:
Theodore M. Miller
Law Offices of Sweeney, Heit & Dietzler
1191 Second Ave., Ste 500
Seattle, WA 98101

DATED this 10th day of February, 2017, at Olympia, Washington.

Mindy Leach, Litigation Paralegal

No. 49540-6-II

WASHINGTON STATE COURT OF APPEALS

DIVISION II

MARK HAUBRICH, Appellant, v. THE PIZZA SPECIALISTS, INC., Respondent.	DECLARATION OF MATTHEW G. JOHNSON

I, MATTHEW G. JOHNSON, do hereby state and declare pursuant to RCW 9A.72.085 as follows:

1. I am above the age of eighteen (18) years and am competent to be a witness.

2. I am an attorney of record for the Plaintiff.

3. Attached hereto, as Exhibit 1, is a true and correct copy of experts from the Deposition of Dennis Gard taken on Tuesday, February 16, 2016. These were submitted as Exhibit 2 to the Johnson declaration dated September 23, 2016. These pages are not contained in the Clerk's Papers.

DATED: February 10th, 2017.

RON MEYERS & ASSOCIATES PLLC

By: _____
Ron Meyers, WSBA No. 13169
Matt Johnson, WSBA No. 27976
Tim Friedman, WSBA No. 37983
Attorneys for Appellant

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

MARK HAUBRICH,

Plaintiff,

vs.

NO. 15-2-00907-6

THE PIZZA SPECIALISTS, INC., d/b/a BREWERY CITY PIZZA COMPANY #3

Defendant.

DEPOSITION OF

DENNIS GARD

TAKEN ON
TUESDAY, FEBRUARY 16, 2016
9:40 A.M.

MEYERS AND ASSOCIATES PLLC
8765 TALLON LANE NORTHEAST, SUITE A
OLYMPIA, WASHINGTON 98516

Q. Okay. And the answer to that question indicates they were purchased approximately in 2004, 2005.

A. Then that's probably what it was.

Q. Any idea how you came to that conclusion?

A. You know, I filled that out quite sometime ago. But I believe in -- in our search of records that -- for us, that we went back as far as we could, and then estimated when those chairs may have been purchased. And that's how I came up with that date, as I recall.

Now, the reason for that is we have gone from keeping a bunch of paper records to -- to scanning records into an electronic file and, as we did that, we purged our paper records and this is -- this is how this came about. Now, I'm trying to remember this. So, we estimated we keep those records -- paper records for about seven years, dailies and things like that, some for less, some only three. So, we couldn't find those records and we made the estimate based on that search I think. That's how we did it.

Q. Okay. So, it could have been further back than that?

A. It could have been. But I think that that estimate was, as I recall, the best estimate we could come up with at the time.

Q. What's the name of the -- of your office manager?

A. Let's see. To be honest, I am not certain they've broken in this manner. We have had chairs break. I'm -- I would be hesitant to say in like manner, but it's possible.

Q. Have you ever had any customers using any of the plastic chairs report that the chair was broken?

A. Not to my knowledge.

Q. When you talked in your previous answer about other chairs breaking, in what manner can you think of the chairs breaking?

A. Well, I know that -- I shouldn't say that. As I recall, there were some cracks and fissures reported to me. I don't recall actually seeing the chairs in a broken state. That's why I'm hesitant to answer that. But I, again, depending upon what my managers would report to me, I would ask them to take them out of service.

I'm doing my best to recall exactly what may have happened, but I've got to be truthful, there may have been another chair leg break like this, but I -- I can't confirm that right now. I know that we have taken at least two of those chairs out of service before we switched over to the new chairs.

Q. Because of concerns about the safety of the chair?

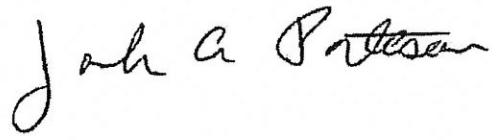
A. Because I or my management staff decided they needed to be taken out of service because of a crack, a fissure, something like that.

CERTIFICATE

I, John A. Portesan, do hereby certify that I reported all proceedings adduced in the foregoing matter and that the foregoing transcript pages constitutes a full, true and accurate record of said proceedings to the best of my ability.

I further certify that I am neither related to counsel or any party to the proceedings nor have any interest in the outcome of the proceedings.

IN WITNESS HEREOF, I have hereunto set my hand this 22nd day of February, 2016.



John A. Portesan